UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

Larry Boecken, Jr., Plaintiff, v. Gallo Glass Company, Defendant.	1:05-cv-00090-OWW-DLB ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Doc. 23) AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (Docs. 24, 28, & 29)

I. Introduction.

This case concerns the termination of plaintiff Larry Boecken's ("Boecken") employment with defendant Gallo Glass Company ("Gallo"). Before the court for decision are cross-motions for summary judgment. Boecken moves for summary judgment on his claims that: (1) he was terminated for his proper use of Family Medical Leave Act ("FMLA") leave in violation of FMLA and the California Family Rights Act ("CFRA");[1] (2) he was actually terminated for his perceived sexual orientation in violation of California's Fair Employment and Housing Act ("FEHA"); and (3) that he was terminated in violation of public policy. Gallo moves for summary judgment on the grounds that (1) Gallo properly terminated Boecken for misuse of his FMLA leave; (2) Boecken's

[1] As an alternative to his summary judgment motion, Boecken moves for summary adjudication of Gallo's "affirmative defense" that it operated under a good faith belief that Boecken improperly used FMLA leave.

sexual orientation played no part in his termination; and (3) Boecken's Public Policy claim is subsumed within his FMLA/CFRA and FEHA claims.

II. Background.

A. Procedural Background.

Boecken filed his complaint for damages against Gallo in Stanislaus County Superior Court on November 18, 2004. The complaint alleged: (1) violation of the FMLA and CFRA, (2) perceived sexual orientation discrimination under FEHA, and (3) termination in violation of public policy. On January 21, 2005, Gallo removed the case to the United States District Court for the Eastern District of California, Fresno Division, claiming federal question jurisdiction. On February 1, 2005, Gallo filed an answer to Boecken's complaint, which included eleven affirmative defenses. On September 25, 2006, the parties filed cross-motions for summary judgment, including more than 100 pages of evidentiary objections.[2] Oral argument was heard September 10, 2007.

B. Factual Background.

Boecken worked at Gallo from 1997 until November 18, 2003. Boecken's grandmother ("grandmother") was approximately 90 years old in October 2002. Boecken's grandmother raised him, and Boecken continued to live with her throughout all relevant time

[2] These objections are resolved in a separate, concurrently-filed memorandum decision.

periods. Because of his grandmother's age and deteriorating health, Boecken tended to her various needs when others could not. Boecken was also his grandmother's primary caretaker.

In October 2002, his grandmother's physician, Dr. Davidson, suggested that Boecken take FMLA leave to care for her. Boecken spoke with Sandra Duvall ("Duvall"), a human resources clerk at Gallo, who gave him the necessary forms. Duvall also claims that she advised Boecken that FMLA leave time was limited to the time certified by the physician, and for the purpose of caring for the individual under the circumstances certified by the physician. Boecken disputes that Duvall gave him this advice, asserting that she only distributed the forms to him.

Boecken obtained the required medical certification regarding his grandmother's condition from Dr. Davidson in early October 2002, and Boecken submitted the certification to Gallo's human resource department as instructed. The certification stated that Boecken's grandmother's physical health was in serious decline. In the certification, Boecken stated:

> I am the sole caregiver for my grandmother who lives with me and who will be 90 years of age in June. She has sustained several heart attacks resulting in chronic heart disease. Naturally, she is frail not only from her medical condition, but also her age. At late, my grandmother has worsened episodes with her heart that strickens [sic] her to her bed for several days at a time requiring constant care and other less severe episodes requiring less care. Requested FMLA will include both partial and full days of absence.

Gallo communicated its approval of the FMLA leave request to Boecken in writing on October 24, 2002. Boecken maintains that his FMLA leave request, and therefore its approval, was for "intermittent leave" that would enable him to reduce his normal

work day from twelve hours to eight hours. Boecken asserts that he opted for this schedule so that he would have enough time and energy to provide for his grandmother's needs, including shopping and preparation of meals. Gallo disagrees with Boecken's characterization of the leave approval, asserting that the FMLA certification stated it would be necessary for Boecken to take intermittent leave, estimated three days every four to six weeks, but said nothing about a regular reduced work schedule. Gallo points out that Boecken's actual leave requests, described below, are consistent with its interpretation of the leave approval.

Any Gallo employee who requested FMLA leave in 2002 was provided a "packet" of information, which included (1) "Notice of Associate Rights and Responsibilities Under Family Care and Medical Leave (FMLA/CFRA) and Pregnancy Disability Leave," (2) "Certification of Health Care Provider," and (3) "Acknowledgment of Receipt." April Tharpe ("Tharpe"), Gallo's human resource coordinator, signed the Acknowledgment, indicating that she provided Boecken with the "packet" of information. Boecken signed the Acknowledgment of Receipt for the FMLA "packet" on September 3, 2002. Additionally, during the years Gallo employed Boecken, the company displayed in the workplace a poster titled "Your Rights Under The Family and Medical Leave Act of 1993." Gallo also posted its FMLA/CFRA policies in a location accessible by all employees.

In October 2003, Boecken's Grandmother needed additional care, as her health had intermittently worsened. On Monday, October 27, 2003, Boecken requested four hours of FMLA leave for that day, starting at 2:00 p.m. On Tuesday, October 28, 2003,

Boecken requested additional FMLA leave for four hours that day and for four hours the following day, again starting at 2:00 p.m. Boecken was scheduled to work until 6:00 p.m. on all three days. Gallo approved Boecken's FMLA leave request.

Tharpe advised Jorian Reed ("Reed"), Gallo's human resources manager, that she was suspicious of Boecken's leave request for October 27, which happened to be the same time Boecken's friend and co-worker, Corey Sweetin ("Sweetin") was leaving work during a temporary training week. When Boecken later told Tharpe he was going to take FMLA leave at 2:00 p.m. on October 28 and 29 as well, she again reported similar suspicions to Reed. Tharpe specifically asked Boecken why he needed the time off. Boecken responded that his niece was unable to care for his grandmother that week, and that there was nobody but himself to care for her. Tharpe did not explain her suspicions to Boecken.

Acting on Tharpe's suspicions, Reed authorized surveillance of Boecken. Reed made a surveillance request to E. & J. Gallo Winery security manager Mark Swaim ("Swaim"). Reed informed Swaim that Boecken was possibly misusing FMLA leave and provided Swaim with a description of Boecken. Reed further advised Swaim that Boecken was supposed to be taking care of his grandmother who lived with him. Reed requested surveillance only during work hours, and he did not suggest what conduct raised suspicions about Boecken's potential abuse of FMLA leave.

Approximately one week after Reed requested surveillance of Boecken, Gallo received the surveillance report ("Report"). The Report disclosed that Boecken did not go directly home from work to care for his grandmother on October 28 or 29. Instead, on

October 28, Boecken drove to a public park, parked his car, walked in the park, stood by the restroom, drove around the park, parked again, walked around again, walked back into some bushes, came out of the bushes, and entered his car and left the park and drove to a hardware store. After Boecken left the hardware store, he drove to another store and then drove off. These activities ran from 2:02 p.m. to 3:00 p.m. The investigator then attempted to find out whether Boecken had returned home, but could not locate his car in the area near his home as of 4:00 p.m. Boecken admitted in a deposition that he would have arrived home at approximately 3:45 p.m. to 3:55 p.m. on October 28.

According to the Report, the following day, October 29, Boecken again left work at 2:00 p.m. He left the building accompanied by another man. They each got into their respective cars and the other man followed Boecken to Tuolumne Regional Park. They parked, stopped briefly, and then drove off the pavement to a dirt area and parked. Both men got out of their cars and walked into the woods together. At this point they became aware of the investigator and left. They went back to their cars and drove away. The investigator reported that a few minutes later he saw Boecken's car parked in a rear parking lot at the same park. About half an hour later, Boecken walked up to his car and left. Shortly before 3:00 p.m., he ran a red light and the investigator lost contact. The investigator again went to Boecken's home and did not observe his car parked there at any time through 6:02 p.m. The investigator confirmed that Boecken was not at home as of 3:55 p.m. Boecken admitted in a deposition

that he did not return home until approximately 4:30 p.m. that workday.

Reed reviewed the report and the videotapes from Tuesday, October 28, and Wednesday, October 29. Reed confirmed that it was Boecken on the tape and that the other man with him on Wednesday was Boecken's co-worker, Sweetin. Based on the investigative report and videotape, Boecken's FMLA certification, and the statements he made to Tharpe about the need to be at home to care for his grandmother, Reed and his supervisor, Lisa Bates ("Bates"), concluded that Boecken had misused his FMLA leave because he did not provide direct care to his grandmother during the time he took off under FMLA. Gallo asserts their conclusion was based solely on information that Boecken had not gone home to care for his grandmother.

Reed and Bates interviewed Boecken to get his side of the story. During this interview, Boecken stated that he visited the park to relieve his own stress and admitted that he provided no care to his grandmother while in the park.[3] Following the investigative interview, Bates and Reed determined that Boecken misused his FMLA leave and that immediate termination was appropriate. They informed Boecken of the basis for his termination.

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[3] This interview was informally recorded in notes taken by Mr. Reed and later attached to Boecken's employment file. Boecken successfully objected to the admission of these notes on the grounds that no foundation was laid for their admission under any exception to the hearsay rule. However, the essential substance of the interview is also reflected in Mr. Reed's deposition testimony. *See* Reed Depo. Excerpts, Doc. 23-9, at 56-57.

Boecken explains some of his activities on the dates in question as follows. His post-work routine regularly included a medium length walk in the park near work of 15-50 minutes to maintain his physical and mental health. Boecken asserts that he needed these walks to unwind and de-stress from work before he went home to provide additional care for the physical and psychological needs of his grandmother. On the way home, Boecken frequently needed to run errands for his grandmother that included shopping and obtaining materials for household repairs.

On both October 28 and 29, Boecken asserts that he ran a few errands on his grandmother's behalf for things that needed to be done for her care. These errands included going to a hardware store and Home Depot for a hand-railing and Smart and Final, for a case of Ensure, a dietary supplement. On October 28, Boecken left work at 2:00 p.m. and went for a short walk before he went home to care for his grandmother. On October 29, Boecken met his friend Sweetin at the park and went for a short walk. Boecken claims he did not "loiter" or engage in homosexual activity while in the park. After both going to the park, and running necessary errands, he drove home. When he got home on October 27, 28 and 29, he continued to give care to his grandmother, including preparing meals, helping her get around, and providing psychological comfort.

Boecken also maintains that Gallo's investigator was positioned so that he could observe the front entrance, but not the back entrance, to Boecken's house. Boecken asserts that he arrived home and entered through the rear of the house on the occasions in question. No one ever knocked on Boecken's door or

called him to see if he was there.

After the weekend, Boecken received a call from Gallo requesting a meeting regarding his FMLA leave and possible fraud. At the meeting, he was questioned about his actions and was shown the video tape. He was also shown the Report, which, according to Boecken, suggests that rather than taking care of his grandmother, Boecken and Sweetin were engaged in homosexual sexual acts.

Boecken asserts that there was a rumor around the plant that he and Sweetin were engaged in a homosexual relationship. Boecken himself never heard anyone at Gallo make any negative or derogatory comments about his sexuality or homosexuals in general. Tharpe admits that she overheard an offhand comment by two other Gallo employees who suggested with "a wink and a nod" that Boecken and Sweetin were "hanging out a lot together." Tharpe maintains that she ignored the comment and there is no evidence that she passed it along to others within HR. Gallo maintains that no one involved in the decisions to investigate and terminate Boecken, namely Bates and Reed, knew then or knows now whether or not he is homosexual.

Boecken met with union representative David Hoffman and Reed on November 18, 2003. Gallo terminated Boecken based on the investigator's reports and video tape.

III. Legal Standard.

Summary judgment is warranted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact." Fed. R. Civ. P. 56(c); *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998). Therefore, to defeat a motion for summary judgment, the non-moving party must show (1) that a genuine factual issue exists and (2) that this factual issue is material. *Id.* A genuine issue of fact exists when the non-moving party produces evidence on which a reasonable trier of fact could find in its favor viewing the record as a whole in light of the evidentiary burden the law places on that party. *See Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-56 (1986). Facts are "material" if they "might affect the outcome of the suit under the governing law." *Campbell*, 138 F.3d at 782 (quoting *Anderson*, 477 U.S. at 248).

The nonmoving party cannot simply rest on its allegations without any significant probative evidence tending to support the complaint. *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001).

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrell, 477 U.S. 317, 322-23 (1986). The more implausible the claim or defense asserted by the nonmoving party, the more persuasive its evidence must be to avoid summary judgment. *See United States ex rel. Anderson v. N. Telecom,*

Inc., 52 F.3d 810, 815 (9th Cir. 1996). Nevertheless, the evidence must be viewed in a light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255. A court's role on summary judgment is not to weigh evidence or resolve issues; rather, it is to determine whether there is a genuine issue for trial. *See Abdul-Jabbar v. G.M. Corp.*, 85 F.3d 407, 410 (9th Cir. 1996).

IV. Discussion.

A. FMLA and CFRA.

1. Overview of FMLA and CFRA.

The purpose of the FMLA is "to balance the demands of the workplace with the needs of families[;]...to entitle employees to take reasonable leave for medical reasons..., and for the care of a child, spouse, or parent who has a serious health condition; and to accomplish [these] purposes...in a manner that accommodates the legitimate interests of employers...." 29 U.S.C. § 2601(b). "The enactment of FMLA was predicated on two fundamental concerns -- the needs of the American workforce, and the development of high-performance organizations." 29 C.F.R. § 825.101(b). "The FMLA is both intended and expected to benefit employers as well as their employees." *Id.* § 825.101(c).

The FMLA provides "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following...[i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition." 29 U.S.C. § 2612(a)(1)(C).

Providing care to a family member encompasses both physical and psychological care, and "includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc." 29 C.F.R. § 825.116(a). It also includes "providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care." *Id.*

An employee who takes leave under the FMLA is entitled to be restored to the position held when the leave commenced, or to be restored to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. 29 U.S.C. § 2614(a).

The FMLA prohibits employers from interfering with an employee's exercise of FMLA rights. It is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]." 29 U.S.C. § 2615(a)(1). The regulations interpret "interference" to include refusing the authorization of FMLA leave, discouraging use of FMLA leave, and using the taking of FMLA leave as a negative factor in employment actions. 29 C.F.R. § 825.220(a-b). It is also "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by [the FMLA]." 29 U.S.C. § 2615(a)(2). The FMLA permits an employee to file a civil action against his or her employer if the employer interferes with the employee's FMLA rights. § 2617(a)(1).

CFRA parallels the FMLA with the shared purpose of balancing the demands of the workplace with the needs of families, and to promote stability and economic security. *See Nelson v. United Technologies*, 74 Cal. App. 4th 597, 611 (1999). Because the CFRA is substantially identical to the FMLA, California courts routinely rely on federal cases when reviewing CFRA. *See Dudley v. Department of Transp.*, 90 Cal. App. 4th 255, 261 (2001).

2. Summary of Parties' Arguments.

Boecken argues Gallo interfered with his FMLA and CFRA rights by not restoring him to his previous position after he took FMLA leave in late October 2003 and by providing inadequate notification of its FMLA leave policies. Boecken also maintains that Gallo retaliated against him for exercising his FMLA rights by using misuse of FMLA leave as a pretext to terminate him. Gallo maintains Boecken's FMLA claims have no merit. Specifically, that Boecken's trips to the park were not a protected activity under the FMLA, and that Boecken's notice claim should fail because Gallo satisfied its general duty to give Boecken notice of his FMLA rights and has no separate duty to specifically explain that he had to use his FMLA leave to care for his grandmother. Finally, Gallo asserts it did not retaliate against Boecken because he used FMLA leave.

3. FMLA Analysis.

a. Interference Claim.

Under FMLA, both Boecken's claim that Gallo violated FMLA by terminating him and his claim that Gallo retaliated against him for exercising his FMLA rights are treated as claims for "interference" under 29 U.S.C. § 2615(a)(1). *Bachelder v. Am.*

West Airlines, Inc., 259 F.3d 1112, 1124-25 (9th Cir. 2002). Unlike claims for unlawful termination brought under many federal civil rights statutes, FMLA interference claims are not analyzed under the traditional *McDonnell Douglas* burden shifting approach. Instead, the court must simply answer a threshold question: Was the employee engaging in covered conduct during FMLA leave. If so, the employer acts unlawfully if it terminates the employee for taking FMLA leave. *Id.* at 1125.

Gallo takes the position that Boecken cannot prevail on his FMLA claim because he was not at home caring for his grandmother on October 28 and 29. It is undisputed that Boecken did not immediately return home at 2:00 p.m. to directly care for his grandmother. He spent some time in the park (the nature of that time spent is not relevant, as it is undisputed that he was not providing care to his grandmother either directly or indirectly while in the park). It is also undisputed that he spent some of the time between 2:00 p.m. and 4:00 p.m. on the days in question running errands, although it is disputed whether he was shopping for household necessities and other items needed by his grandmother. It is also disputed when he arrived at home on the days in question. The investigator reported that he did not see anyone enter the house before 6:00 p.m., while Boecken maintains he entered the home through the back door before 6:00 p.m..

The key question is whether Boecken's conduct constitutes "caring for" his grandmother as that term is defined by the statute. FMLA does not define the phrase "to care for." However, the Department of Labor regulations discuss what it means when an employee is "needed to care for" a family member:

> (a) The medical certification provision that an employee is "needed to care for" a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.
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> (b) The term also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.
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> (c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member includes not only a situation where the family member's condition itself is intermittent, but also where the employee is only needed intermittently--such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party.

29 C.F.R. § 825.116(a). The legislative history of the FMLA provides additional interpretive guidance:

> The phrase "to care for" ... is intended to be read broadly to include both physical and psychological care. Parents provide far greater psychological comfort and reassurance to a seriously ill child than others not so closely tied to the child. In some cases there is no one other than the child's parents to care for the child. The same is often true for adults caring for a seriously ill parent or spouse.

S. Rep. No. 103-3, at 24 (1993), reprinted in 1993 U.S.C.C.A.N. at 26.

The Ninth Circuit has noted that "the [] regulations list examples of situations in which an employee may 'care for' a family member, but the list by its terms is not all-inclusive. In addition to introducing the 'situations' by the phrase 'for example,' the listing ends with 'etc.,' signifying that other

types of activities are contemplated." *Scamihorn v. Gen. Truck Drivers*, 282 F.3d 1078, 1087 (9th Cir. 2002).

The caselaw sheds some light on the lawfulness of running errands on behalf of the person for whom one is caring. In *Scamihorn*, a truck driver took FMLA leave from his job to move to another city to care for his father, who was suffering from depression following the death of a Scamihorn's sister. *Id.* at 1080-81. While residing with his father, Scamihorn talked with his father about his sister, performed various chores around the house, including shoveling snow, chopping firewood, and clearing the yard, and drove his father to counseling sessions on several occasions. Upon returning to his job, Scamihorn was not reinstated to his position. *Id.*

The district court granted summary judgment for the employer, concluding that Scamihorn's father was able to care for his own basic needs and, as a result, Scamihorn's actions were not covered by FMLA. The Ninth Circuit reversed, concluding that Scamihorn raised a genuine issue regarding whether his activities were necessary, "because his father was at times unable to care for some of his own basic needs." The Ninth Circuit reasoned:

> The percentage of adults in the care of their working children or parents due to physical and mental disabilities is growing. Because removing people from a home environment has been shown to be costly and often detrimental to the health and well-being of persons with mental and physical disabilities there is a trend away from institutionalization. While preferable, independent living situations can result in increased care responsibilities for family members, who by necessity are also wage earners. Home care, while laudable, can also add to the tension between work demands and family needs.

> S. Rep. No. 103-3, at 6 (1993), reprinted in 1993 U.S.C.C.A.N. at 8-9. Scamihorn experienced first-hand the tension between his job and his father's psychological well-being. The purpose of the FMLA is to relieve some of this tension by giving employees time off without pay to care for relatives who suffer from serious health conditions.
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> Admittedly, there are gaps and uncertainties in the record here that suggest Scamihorn may be unable ultimately to prove that he meets the criteria established by the Department of Labor regulations. For instance, it appears that because Joseph Sr. worked in the Veterans Medical Center, he was able to obtain treatment without officially taking time off from work and completing insurance and other medical forms to document and authorize the treatment. He also was able to work from home and thereby avoid taking sick leave when he felt too depressed to go to his office. The mere lack of formalities alone, however, would not justify the exclusion of FMLA coverage here. Viewing the evidence in the light most favorable to Scamihorn, as we must, we conclude that he set forth sufficient evidence to create genuine issues of disputed material fact to be resolved in a trial.

Scamihorn, 282 F.3d at 1088. In response to the employer's objection that "caring for" should involve some level of participation in ongoing treatment, the Ninth Circuit responded:

> Scamihorn does not claim to have personally attended any of [his father]'s counseling sessions..., but he participated in the treatment through both his daily conversations with his father about [his sister] and the grief associated with her death and his constant presence in his father's life. Both [of his father's Doctors] emphasized this fact.

Id. at 1088.

In contrast, in *Tellis v. Alaska Airlines*, 414 F.3d 1045 (9th Cir. 2005), the Ninth Circuit affirmed the grant of summary judgment to an employer where the employee took FMLA leave to care for his pregnant wife but then took a four day trip to retrieve the family's car from another location, ostensibly to reassure his wife. The Ninth Circuit reviewed Scamihorn and several other cases from other jurisdictions, concluding that a

particular activity constitutes "caring for" a family member under the FMLA only when the employee has been in close and continuing proximity to the ill family member. Id. at 1047 (citing *Brunelle v. Cytec Plastics, Inc.*, 225 F. Supp. 2d 67, 77 & n. 13 (D. Me. 2002) (denying employer's summary judgment motion when son spent "the entire day providing care and comfort to his critically ill father"); *Briones v. Genuine Parts Co.*, 225 F. Supp. 2d 711, 715-16 (E.D. La. 2002) (denying employer's summary judgment motion when employee took leave to care for his three healthy children while his wife cared for his hospitalized fourth child). The Ninth Circuit also examined a state court decision, *Pang v. Beverly Hospital, Inc.*, 79 Cal. App. 4th 986 (2000), in which the California Court of Appeal held an employee was not protected under the CFRA. The employee took leave to help her ailing mother move from her two-story home to a one-level apartment to minimize the need for at-home assistance. The *Pang* court stated:

> Pang's admissions make clear that she was not there to directly, or even indirectly, provide or participate in medical care for her mother. Instead, she was there to help pack her mother's belongings and tell the movers where to place her mother's furniture. While Pang's presence may have provided her mother some degree of psychological comfort, this was merely a collateral benefit of activities not encompassed by the Commission's regulations.

Id. at 996.

The *Tellis* court concluded that these out-of-circuit decisions supported its conclusion that "Tellis's activities cannot be considered 'caring for' his wife."

> Instead of participating in his wife's ongoing treatment by staying with her, he left her for almost four days. Tellis claims his trip provided

> psychological reassurance to his wife, but he did not travel to Atlanta to participate in his wife's medical care. Having a working vehicle may have provided psychological reassurance; however, that was merely an indirect benefit of an otherwise unprotected activity--traveling away from the person needing care. Tellis also claims his phone calls provided moral support and comfort, but his phone calls during his trip did not constitute participation in ongoing treatment. Common sense suggests that the phone calls Tellis made do not fall within the scope of the FMLA's care for" requirement. The language of the decisions supra makes this clear: the Scamihorn court relied on the son's "daily conversations" and "constant presence." 282 F.3d at 1088. Brunelle relied on the son's spending the "entire day" with his father. 225 F.Supp.2d at 77 n. 13.
>
> For the foregoing reasons, we hold that Tellis's cross-country trip to retrieve the family car, and phone calls to his wife while he was away, cannot as a matter of law be considered "caring for" his wife under the FMLA. Consequently, his absence from employment during that period was not protected by the FMLA.

Id. at 1047 (emphasis added).[4]

In terms of the errands Boecken claims he ran for his grandmother on the days in question, his conduct lies somewhere between that of Scamihorn and Tellis. Unlike Tellis, He claims to have performed errands close to home. However, unlike Scamihorn, Boecken was not performing chores at the home in close proximity to the individual for whom he was caring. On the record presently before the court, it cannot be determined as a matter of law whether Boecken's errand-running was an activity covered by FMLA.

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[4] Gallo also cites an unpublished decision, *Overlay v. Covenant Transp., Inc.*, 178 Fed. Appx. 488, 494-95 (6th Cir. 2006), in which the Sixth Circuit determined an employer did not violate FMLA for terminating a mother for taking one day off to run errands for her disabled daughter because the errands were either "not time sensitive" or were merely "routine activities" like picking up laundry.

The caselaw sheds less light on the lawfulness of Boecken's walks in the park. Plaintiff cites a district court decision, *Jennings v. Mid-Am. Energy Co.*, 282 F. Supp. 2d 954, 961-62 (S.D. Iowa 2003), in which an employee was certified for FMLA for her own serious health condition (rheumatoid arthritis). When her employer learned she had used some of her FMLA leave time to go shopping, she was terminated. The district court refused to enter summary judgment for the employer, reasoning that an employee with a serious health condition might be "unable to perform the essential functions of her job...but capable of stopping at a store to purchase one item on her way home." *Id.* at 961. The *Jennings* court further reasoned: "The FMLA contains no requirement that an individual on intermittent medical leave must immediately return home, shut the blinds, and emerge only when prepared to return to work. Such a rule would be both unreasonable and impossible." *Id.* at 961-96.

Plaintiff asserts that *Jennings* stands for the proposition that he had no obligation to immediately return home to care for his grandmother. But, Jennings is distinguishable in one important respect. *Jennings* concerned someone who was taking FMLA leave for her <u>own</u> medical condition, not to care for the condition of another. The key statutory provision -- "caring for" -- was not implicated in *Jennings* at all. The key question in this case is whether Boecken's walks, taken during his FMLA leave, constituted "caring for" his grandmother. It is undisputed that Boecken took the walks for his own purposes and was not in contact with his grandmother during the walks. He did not take FMLA leave for his own medical needs. Any "care" was

for himself. As in *Tellis*, "common sense" suggests that Boecken's walks do not qualify as "caring for" his grandmother. Accordingly, Gallo's decision to terminate him for engaging in non-covered activities during his FMLA leave did not constitute interference with Boecken's FMLA rights. Gallo's motion for summary judgment on the FMLA interference claim is therefore GRANTED. Boecken's cross-motion is DENIED.[5]

b. Notice Claim.

Boecken also claims that Gallo violated FMLA by failing to explain to him that his conduct, namely taking a walk in the park after work and running errands, was not covered by FMLA. Gallo correctly asserts that it has no obligation to provide such detailed notice to its employees. Rather, the regulations require employers to notify employees generally of their rights and obligations under FMLA. 29 C.F.R. § 825.301. Section 825.301 provides that the notice must include, as appropriate:

> (I) that the leave will be counted against the employee's annual FMLA leave entitlement (see § 825.208);
>
> (ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see § 825.305);
>
> (iii) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;
>
> (iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see § 825.210),

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[5] This also disposes of Boecken's motion for summary adjudication of Gallo's "affirmative defense" that it had a legitimate, non-discriminatory basis for terminating him. Plaintiff's motion is DENIED.

> and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);
>
> (v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see § 825.310);
>
> (vi) the employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see § 825.218);
>
> (vii) the employee's right to restoration to the same or an equivalent job upon return from leave (see §§ 825.214 and 825.604); and,
>
> (viii) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see § 825.213).
>
> (2) The specific notice may include other information--e.g., whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so. A prototype notice is contained in Appendix D of this part, or may be obtained from local offices of the Department of Labor's Wage and Hour Division, which employers may adapt for their use to meet these specific notice requirements.

It is undisputed that Gallo provided general notice to Boecken by displaying its FMLA policies and by giving Boecken the Certification form, the Notice of Associate Rights and Responsibilities, and the approval notice.

Boecken's assertion that Gallo was required to provide him with more specific notice as to the lawfulness of his conduct is not supported by any legal authority. Boecken's citation to *Bachelder*, 259 F.3d 1112, is inapposite. In that case, the Ninth Circuit held that an employer is responsible for telling employees which of the four Department of Labor-approved methods it has selected for tracking the twelve-month period that

determines when each employee's twelve weeks of leave has been used up. *Id.* at 1129. In so holding, the *Bachelder* court acknowledged that "FMLA's implementing regulations do not expressly embody a requirement that employers inform their employees of their chosen method for calculating leave eligibility." *Id.* at 1127. However, after reviewing the regulations as a whole, the Ninth Circuit concluded that "[t]he regulations nonetheless plainly contemplate that the employer's selection of one of the four calculation methods will be an open one, not a secret kept from the employees, the affected individuals." *Id.* The *Bachelder* court further reasoned "[t]hat the Labor Department so understood its own regulations is confirmed by the Department's statement, when announcing the regulations, that '[e]mployers must inform employees of the applicable method for determining FMLA leave entitlement when informing employees of their FMLA rights.' 60 Fed. Reg. at 2,200." *Id.* at 1128.

Boecken points to no provision in the regulations or the statute that implies a requirement that Gallo notify employees of specific conduct that is and is not covered by FMLA. *See also McDaneld v. E. Muni. Water Dist. Bd.*, 109 Cal. App. 4th 702 (2003)(rejecting argument that it was employer's responsibility to notify employee that he could not play golf and work in his yard during family leave).

Gallo's motion for summary judgment on Boecken's notice

claim is GRANTED.[6] Boecken's cross-motion on this issue is DENIED.

4. CFRA Analysis.

Unlike claims under FMLA, CFRA claims are evaluated according to the so-called *McDonnell Douglas* burden shifting analysis. *Nelson,* 74 Cal. App. 4th at 613.

In *Guz v. Bechtel Nat. Inc.* 24 Cal. 4th 317, 354 (2000), the California Supreme Court summarizes the application of the *McDonnel Douglass* test.

> At trial, the McDonnell Douglas test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. While the plaintiff's prima facie burden is "not onerous", he must at least show " 'actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a [prohibited] discriminatory criterion...."
>
> The specific elements of a prima facie case may vary depending on the particular facts. Generally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive.
>
> If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. This presumption, though "rebuttable," is "legally mandatory." Thus, in a trial, "[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case."

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[6] As a result of this conclusion, it is not necessary to discuss Gallo's alternative argument about lack of prejudice.

> Accordingly, at this trial stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to "raise a genuine issue of fact" and to "justify a judgment for the [employer]," that its action was taken for a legitimate, nondiscriminatory reason.
>
> If the employer sustains this burden, the presumption of discrimination disappears. The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff.

Id. (internal citations omitted).

The *Guz* court clarified how the *McDonnell Douglas* formula should apply, under California law, to an employer's motion for summary judgment against a claim of prohibited discrimination. An employer may either demonstrate that the employee cannot demonstrate one of the elements of his prima facie case, or may, alternatively, demonstrate that he was terminated for a legitimate, non-discriminatory reason. *Id.* at 356-57. If, under the second scenario, the employer's nondiscriminatory reason is "creditable on its face," the burden shifts to the employee to "point[] to evidence which nonetheless raises a rational inference that intentional discrimination occurred." *Id.* at 357.

Here, Gallo satisfies the latter requirement, having submitted evidence that, if believed, shows Boecken was fired for misusing his FMLA leave. The question then becomes whether the employee's evidence raises a triable issue of fact regarding pretext.

> A nonmoving plaintiff may show pretext either indirectly by demonstrating that the employer's stated reasons for its adverse action were not credible, or directly by establishing that the employment decision was more likely motivated by a discriminatory reason.

Nelson, 74 Cal. App. 4th at 613 (internal citations and quotations omitted).

Here, the only evidence Boecken presents to support of the existence of pretext in the context of FMLA is the affidavit of Mark Reyna, a former Gallo employee who claims he was unfairly terminated for FMLA misuse.[7] (Exhibit D. to Plaintiff's Statement of Evidence in Opposition, Doc. 43-9 at 6-9.)[8] Mr. Reyna makes two potentially pertinent assertions. First, he

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[7] Boecken also cites the deposition of Sandra Duvall in support of his assertion that the Human Resources department at Gallo "has in the past discouraged employees from exercising their rights under FMLA." But, Gallo correctly points out that the cited testimony, Duvall Depo. at 42:18-43:12, does not support this assertion. Duvall testified that she has on several occasions counseled employees that they could not use leave time granted to care for relatives to go to the store to purchase items other than medication.

[8] Mr. Reyna also claims to have witnessed other employees being terminated unfairly for FMLA misuse. Any evidence Reyna presents concerning the treatment of individuals other than himself is hearsay; he may only attest to events of which he has personal knowledge

Gallo also objects generally to the introduction of Reyna's affidavit on the ground that he was never identified by Boecken during discovery and Gallo never had a chance to depose him. Gallo requests that the declaration be excluded on the ground that Boecken violated his duty to seasonably supplement his initial disclosures and prior discovery responses with respect to this witness. Alternatively, Gallo requests that decision on summary judgment be continued so that Gallo can have an opportunity to depose Mr. Reyna. Because, even assuming the admissibility of this evidence, Boecken's claims fail, it is not necessary to address Gallo's objection.

claims that in 2002, April Tharpe spoke to Reyna and a group of other Gallo employees and emphasized that Gallo was "cracking down" on the "misuse" of FMLA by employees. Reyna Aff., at ¶7. Reyna understood this to be a "threat by Gallo that employees should not be using FMLA even if they were entitled to do so." (*Id.*)

Reyna also asserts that he was wrongfully terminated for FMLA fraud. He describes the circumstances as follows. His wife was diagnosed with colon cancer in August 2005, which required extensive medical care. Mr. Reyna provided her with extensive assistance, including performing household chores, and helping to administer and monitor her chemotherapy treatments. *Id.* at ¶8. As a result of providing this assistance, Mr. Reyna was exhausted when he arrived at work. On August 14, 2006, he asked his supervisor for time off work. The request was denied. *Id.* at ¶9. Mr. Reyna explained that he was suffering from back pain because of the "air bag" work he was assigned to perform, as opposed to his old work as a fork lift driver, and asked to be reassigned to a different task. This request was denied. *Id.* at 10. On August 21, 2006, Mr. Reyna told his supervisor he needed to take time off because he had been working for seven days straight, got off at 8:00 a.m. on Sunday and was exhausted because he had been helping around the house. Reyna also complained that he was tired and overworked as a result of being assigned to doing air bag work and asserted it was unsafe for him to keep working. His requests were denied. *Id.* at ¶11. Finally, at 3:30 a.m., Mr. Reyna told his supervisor he was "going home and using FMLA leave time." *Id.* His supervisor did

not say this was improper. *Id.* He was subsequently informed by Tharpe that Gallo had placed under investigation for FMLA fraud. *Id.* at 12. Although Mr. Reyna does not explicitly state the basis for his termination, it is implied that he was terminated for FMLA fraud. *Id.*

Although, under certain circumstances, evidence of a pattern of other, similar discharges might establish pretext, is not at all clear why Gallo's termination of Mr. Reyna, who was believed to also be misusing FMLA leave, but under totally different circumstances, provides any reason to believe pretext was at work in this case. *See Mundy v. Household Finance Corp.*, 885 F.2d 542, 546 (9th Cir. 1989)(finding that the dismissal of six other employees over the age of 40 did not, on its own, establish a pattern and practice of age discrimination, as plaintiff offered no evidence that the terminations were without good cause or that age was a determining factor). Here, there is no evidence to suggest that Mr. Reyna's termination was without good cause. For example, Mr. Reyna fails to supply critical foundational evidence, including evidence establishing that he submitted a FMLA certification and was approved for FMLA leave by Gallo prior to walking off the job on August 21, 2006.[9]

Gallo's motion for summary judgment on the CFRA claim is GRANTED. Boecken's cross motion for summary judgment on this issue is DENIED.

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[9] Mr. Reyna's assertion that Tharpe's warning that Gallo was "cracking down" on FMLA fraud was meant to intimidate employees from using FMLA is inapposite here, as Boecken was clearly not intimidated from attempting to use FMLA leave.

B. Perceived Sexual Orientation Discrimination.

Boecken asserts that Gallo discriminated against him when it used Boecken's perceived homosexuality as a factor in his FMLA investigation and subsequent termination.

Under FEHA, "[i]t is unlawful ... [f]or an employer, because of ... sexual orientation ... to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." Cal. Gov't Code § 12940(a). Sexual orientation discrimination "includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics." § 12926(m).

Because of the similarity between FEHA and federal employment discrimination laws, California courts look to pertinent federal precedent when applying FEHA and applies the *McDonnell Douglas* burden shifting described above. *See Guz,* 24 Cal.4th at 354 . Here, Gallo first attempts to show that Boecken cannot demonstrate the first element of a prima facie case: that decision-makers perceived him to be homosexual or bisexual. *See* Cal. Gov. Code § 12926(m). Gallo contends no evidence exists that any person making a decision adversely affecting Boecken perceived him to be homosexual. In support of this position, Gallo asserts that Tharpe knew Boecken and Sweetin were friends, but had no reason to believe he was homosexual or bisexual.

However, Tharpe testified at her deposition that although she never "heard a rumor" that Boecken and Sweeten were homosexuals, she did state that she "heard people, couple of the other union hourly employees would say, 'Oh, they're hanging out a lot,' wink, wink, nod, nod. They'd wink and nod, and I would just ignore it." Tharpe Depo. at 15:17-20.

Gallo also maintains that neither of the two individuals responsible for terminating Boecken, Reed and Bates, had reason to believe Boecken was homosexual or bisexual. Bates in fact stated that she had no suspicion that Boecken was a homosexual. However, the investigator's report concerning Boecken's activities on October 29, might insinuate that Boecken and Sweetin were engaged in homosexual conduct. For example, the Report indicates that at 2:08 p.m. the "videotape shows the subject driving out of the small parking lot toward a large dirt area across the street, near three school buses. Continuing videotape shows the subject and his unidentified male companion walking toward a wooded area and out of view." The next entry in the Report indicates that at 2:14 p.m. "[w]e located the subject and his companion in the wooded area, inside a makeshift sleeping area that had four walls and blankets. We observed the [Boecken's] head pop up as he heard our presence and quickly put his head down. We then observed his male friend's head pop up quickly and then put his head down." The Report further indicates that a few minutes later, Boecken and Sweetin were seen walking away from the sleeping area and towards their vehicles. Bates and Reed were privy to the report. Gallo maintains that neither Bates nor Reed read anything into the investigation

report, but viewing the evidence in a light most favorable to Plaintiffs, Bates and Reed had reason to perceive Boecken to be a member of a protected class.

Alternatively, Gallo has presented a legitimate basis for Boecken's termination. The question then becomes whether Boecken has presented any evidence tending to show that his termination for FMLA misuse was a pretext for discrimination on account of his perceived sexual orientation. To satisfy his burden, Plaintiff must present "evidence supporting a rational inference that intentional discrimination, on grounds prohibited by the statute, was the true cause of the employer's actions." *Guz*, 24 Cal. 4th at 361 (*citing Hicks v. St Mary's Honor Ctr.*, 509 U.S. 502, 510-20 (1993)); *see also Nelson*, 74 Cal. App. 4th at 613 ("A nonmoving plaintiff may show pretext either indirectly by demonstrating that the employer's stated reasons for its adverse action were not credible, or directly by establishing that the employment decision was more likely motivated by a discriminatory reason.").

The only evidence that comes anywhere close to demonstrating pretext concerns the reasons for Thorpe's "suspicions" about Boecken's use of FMLA leave, which she communicated to Reed. It is undisputed that Thorpe heard rumors that Boecken and Sweetin were romantically involved.[10] It is also undisputed that Boecken

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[10] Sweetin' stated that he recalled "a female employee at Gallo approaching [him] some time after October 29, 2003, who strangely questioned [him] about [his] sexuality and said there was a surveillance tape of [him] and Larry Boecken walking in the park." Sweetin Aff., Doc. 43-9, at ¶9. Gallo points out that this statement stands in complete contradiction to his prior

used FMLA leave more than 20 times before he was placed under investigation. The stated reason for initiating the investigation of Boecken was Thorpe's suspicion that Boecken was leaving work to spend time with Sweetin, a man with whom it was rumored Boecken had a romantic relationship. Viewed in the light most favorable to Plaintiff, the evidence also suggests that Reed and Bates, the individuals who made the decision to terminate Boecken, had some reason to suspect that Boecken might be romantically involved with Sweetin. However, there is absolutely no evidence to support an inference that Reed and Bates terminated Boecken because of any perception they might have had about his sexual orientation. He was observed to be engaged in recreational activities in a park while he was on FMLA leave to care for his grandmother. Boecken has not demonstrated that Gallo's stated reasons for terminating him were not genuine and lawful, nor has he in any way "establish[ed] that the employment decision was more likely motivated by a discriminatory reason." *See Nelson*, 74 Cal. App. 4th at 613.

Gallo's motion for summary judgment on the FEHA claim is GRANTED. Plaintiff's cross-motion is DENIED.

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deposition testimony, *see objections*, Doc. 50 at 12-13. Gallo argues that the affidavit should be disregarded as a "sham" created only to avoid summary judgment. *See Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 267 (9th Cir. 1991). As explained in greater detail in the accompanying evidentiary rulings, Gallo's motion is GRANTED and this statement by Sweetin is deemed inadmissible. Even if it was admissible, it would not have shifted the analysis, as it only lends support to the undisputed fact, as admitted by Thorpe, that there were rumors at Gallo regarding Boecken and Sweetin's sexual orientation.

C. Termination in Violation of Public Policy.

Boecken's third claim for relief is termination in violation of public policy. Specifically, Boecken asserts Gallo terminated him in violation of FMLA/CFRA and FEHA, which are the underlying foundations of his public policy claim. At the hearing on these motions, the parties agreed that Boecken's public policy claim is subsumed within his the FMLA/CFRA and FEHA claims. Accordingly, the parties agreed that the public policy claims rise and fall with the other claim in this case. Gallo's motion for summary judgment on this claim is GRANTED. Plaintiff's motion for summary judgment is DENIED.

V. Conclusion.

For the reasons set forth above, Gallo's motion for summary judgment is GRANTED, and Boecken's motion for summary judgment is DENIED.

Defendant shall submit a form of judgment consistent with this decision within five days following the date of service of this decision.

SO ORDERED

DATED: September 30, 2008

/s/ Oliver W. Wanger
Oliver W. Wanger
United States District Judge